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SUPREME COURT OF THE UNITED STATES

_____ Term _____

No._____

FANNIE MAE WHITTINGTON,
Petitioner,

vs.

DR. JOHN D. JOHNSTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Fannie Mae Whittington, respectfully prays for a writ of certiorari herein to review a certain final decision of the Circuit Court of Appeals for the Fifth Circuit in the above entitled action, the opinion and decision of said Court having been rendered and filed on January 29, 1953, rehearing denied on April 13, 1953; the effect of which said decision of the Circuit Court of Appeals was

that the complaint of the petitioner was properly dismissed by the District Court on the ground that

> "the complaint clearly fails to state a claim for relief within the scope of 8 U.S.C.A. 43 and 47(3) upon which it is expressly based, for which reason it was proper to dismiss it"

and in the words of the Circuit Court of Appeals further stating:

> "We leave undetermined the question whether the complaint should have been dismissed 'for lack of federal jurisdiction.'"

The decision of the Court was divided, Judge Rives rendering a strong dissent. Judge Rives also dissented in the denial of a rehearing, R. 49-59.

A. STATEMENT OF THE MATTER INVOLVED

Plaintiff filed complaint in the United States District Court pleading that the defendants caused her to be adjudicated as insane and to be ordered to be committed to an insane asylum, to be arrested, and to be confined in jail, all without due process of law. The complaint as amended contains five counts, two under 8 U.S.C. 43 and three under 8 U.S.C. 47(3). Counts 2 and 3 are substantive counts and charge that the defendants, under color of law, while plaintiff was sane, caused her to suffer the injuries complained of. Counts 1, 4 and 5 charge that the defendants conspired to commit the acts complained of.

Plaintiff was a woman, a citizen of Pike County, Alabama. All counts alleged that on the 5th of January, 1951, she was ordered confined to the Bryce Insane Hospital by the Probate Judge of Pike County, Alabama, and was arrested and confined in the Pike County Jail from January 5th to 9th, 1951, while awaiting admission to Bryce Insane Hospital. Plaintiff alleges that the defendants

caused this confinement to be brought about without her being accorded due process of law.

In Counts 2 and 3, under 8 U.S.C. 43, plaintiff alleges that the defendants deprived her of her rights, privileges and immunities secured to her by Section 1 of the 14th Amendment of the Constitution of the United States, **under color of the Code of Alabama of 1940,** the particular portions of which Code are set out, by causing her to be declared insane and having her ordered committed to Bryce Insane Hospital, and while awaiting incarceration in said hospital by causing her to be arrested and to be confined from January 5th to 9th, 1951, in the Pike County, Alabama, Jail, without any notice to her and without giving her the opportunity of being heard, and that during all of this time plaintiff was sane, and that thereby the defendants did subject the plaintiff to the deprivation of her liberty without due process of law and in violation of the rights, privileges and immunities secured to her by the 14th Amendment to the Constitution of the United States. Count 2 makes these allegations simply, and Count 3 alleges that these acts were done wilfully, knowingly and maliciously.

In Count 1 plaintiff alleges that she was adjudged sane subsequent to her confinement, by the Probate Court of Pike County, Alabama, under Title 45, Section 210, Code of Alabama, 1940, which sets out the proceeding for a jury to pass upon the sanity of an alleged insane person.

In Counts 4 and 5 she alleges that she was at all times during the conspiracy and during the events complained of, a sane person.

Counts I and 5 allege that the defendants knowingly, wilfully and maliciously conspired to have plaintiff wrongfully confined to Bryce Insane Hospital, whereas Count

4 merely alleges that they conspired to have plaintiff confined in the Bryce Insane Hospital while she was sane.

Defendants filed a motion to dismiss, which motion was granted by the District Judge (R. 35-38) on the grounds (1) that the court had no jurisdiction and (2) that the complaint did not state a cause of action in that none of the defendants was an officer.

B. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

8 U.S.C. 43, one of the statutes under which the Petitioner brought suit in the said District Court, reads as follows, to-wit:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8 U.S.C. 47(3), another statute under which some of the counts are brought, reads as follows, to-wit:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose of depriving, either directly, or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or se-

curing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The District Court had jurisdiction under 28 U.S.C. 1343.

The following cases hold that District Courts have jurisdiction of matters that arise under 8 U.S.C. 43 and/or 8 U.S.C. 47(3), or else they have taken jurisdiction of such matters of their own accord:

Terry vs. Adams, ____U.S.____ (May 4, 1953)

Bell vs. Hood, 327 U.S. 678 (1946);

Collins vs. Hardyman, 341 U.S. 651; District Court took jurisdiction when case filed, but dismissed for failure to state a cause of action, 80 Fed. Supp. 501;

Binderup vs. Pathe Exchange, Inc., 263 U.S. 291 (1923). United States Supreme Court rules that District Court has jurisdiction when a complaint sets forth a substantial claim under a Federal Statute;

Terry vs. Adams, Temporary 97 Vol. 14 U.S. 745 (May 4, 1953);

Watkins vs. Oaklawn Jockey Club, 183 F2d 440, Eighth Circuit Court of Appeals (1949), 8 U.S.C. 43;

McShane vs. Moldovan, 172 F2d 1016, Sixth Circuit Court of Appeals (1949), 8 U.S.C. 43;

Picking vs. Penn. Ry. Co., 151 F2d 240, Third Circuit Court of Appeals (1945), 8 U.S.C. 43;

Valle vs. Stengel, 176 F2d 699, Third Circuit Court of Appeals (1948), 8 U.S.C. 43;

Battone vs. Lindsley, 170 F2d 705, Tenth Circuit Court of Appeals (1948), 8 U.S.C. 43 and 47(3);

Mitchell vs. Greenough, 100 F2d 184, Ninth Circuit Court of Appeals (1938), 8 U.S.C. 47(3);

Allen vs. Corsano, 56 Fed. Supp. 170, District Court of Delaware (1944), 8 U.S.C. 47(3);

Robeson vs. Finelli, 94 Fed. Supp. 62, District Court of New York (1950), 8 U.S.C. 47(3) and 8 U.S.C. 43.

The following cases hold that there was no due process, or take jurisdiction on question of due process:

Urquhart vs. Brown, 205 U.S. 179 (1907);

In Re Nagle, 135 U.S. 41 (1889);

Dexter vs. Hall, 82 U.S. 9 (1872);

Simon vs. Craft, 182 U.S. 427;

Walters vs. McKinnis, 221 F 746 (1915);

Shields vs. Shields, 26 Fed. Supp. 211 (1939);

Bolmer vs. U.S. Fidelity & Guaranty Co., 11 Fed. Supp. 564 (1935);

In Re Petition of Michael Gannon, 5 L.R.A. 359 (1889);

Underwood vs. The People, 32 Mich. 1;

Portland vs. Bangor, 65 Maine 121;

Barry vs. Hall, 92 F2 222 (District of Columbia);

State vs. Billings, 55 Minn. 467.

(See also Moses vs. Tarwater, 50 So2d 757 (1952).

The following cases hold a federal jurisdiction question was involved:

Cohen vs. Virginia, 6 Wheat 264;

Osborn vs. Bank of United States, 9 Wheat. 738;

Smith vs. Kansas City Title Co., 255 U.S. 180;

Wiley vs. Sinkler, 179 U.S. 58;

Swafford vs. Templeton, 185 U.S. 487, 46 L. Ed. 1005.

The importance of the general subject of the instant case is indicated by the fact that another case, Marianne Yglesias vs. Gulfstream Park Racing Association, Inc., from the Fifth Circuit, 201 F2d 817, is now before this Court or just prior to this time has been before the Court on petition for writ of certiorari. The facts in the instant case are not the same as the facts in the Yglesias Case, and a decision in that case would not determine the instant case. However, each case involves at least one of the same statutes. This Court has not yet determined the law in this very important group of cases.

C. QUESTIONS PRESENTED

The questions presented are divided into four general groups. All questions grouped will be discussed together.

Group 1

Did the District Court have jurisdiction over the subject matters under Counts 2 and 3 of the complaint (the substantive counts) under 8 U.S.C. 43?

Are private individuals amenable to other private individuals for wrongful acts under 8 U.S.C. 43?

Is it not judicial legislation for the Court to read the word "person" in 8 U.S.C. 43 as being the word "officer"?

Are persons who are designated in a state law as the instruments to motivate the law, who unlawfully, knowingly and maliciously use that law to effect the incarceration of any person without due process, amenable under 8 U.S.C. 43?

Were not the defendants per se such quasi officers of the State of Alabama, under the Alabama Code, Title 45, Sections 208 and 209 and 210 so as to bring them within a statute regulating the conduct of those acting under color of law?

Was not the act complained of by plaintiff in effect actually State action, caused by defendants either as individuals or as quasi officers under Alabama Statutes above cited?

Group 2

Did the District Court have jurisdiction over the subject matter under Counts 1 and 4 and 5 of the complaint under 8 U.S.C. 47(3)?

Are private persons who conspire to deprive any person of equal privileges, protection and immunities under the Constitution and Laws of the United States amenable under 8 U.S.C. 47(3)?

Is it not judicial legislation for the Court to read the word "persons" in 8 U.S.C. 47(3) as being the word "officers"?

Are persons who are designated as the instruments in a state law, and who conspire together with the object of depriving any person who is a member of a designated

class of persons, no matter how small in number, of equal privileges, protection, and immunities, under the Constitution and Laws of the United States, in wrongfully causing such person to be wrongfully incarcerated without due process of law, amenable under 8 U.S.C. 47(3)?

Do not the Alabama Insane Commitment statutes as set out in Title 45, Sections 208, 209 and 210, Code of Alabama, 1940, create and set up a narrow, small and limited class of persons, viz, insane persons and those who may be adjudicated and incarcerated as insane persons without due process of law and without notice and without the opportunity to be heard, and did not plaintiff belong to such class?

Was not the conspiracy of the defendants as set forth in Counts 1 and 4 and 5 such a conspiracy as is contemplated in 8 U.S.C. 47(3), in that plaintiff, by state action, was deprived of equal privileges, protection and immunity under the Constitution and Laws of the United States as being one of a narrow and small class, viz, alleged insane persons?

Group 3

Does Title 45, Sections 208, 209 and 210, Code of Alabama, 1940, accord, grant and secure due process of law in line with other comparable state and federal decisions?

Group 4

Did the District Court rightly dismiss plaintiff's bill of complaint for failure to state a cause of action under 8 U.S.C. 43 as to Counts 2 and 3?

Did the District Court rightly dismiss plaintiff's complaint without taking jurisdiction of its subject matter under 8 U.S.C. 43 as to Counts 2 and 3?

Did the District Court rightly dismiss plaintiff's bill of complaint for failure to state a cause of action under 8 U.S.C. 47(3) as to Counts 1 and 4 and 5?

Did the District Court rightly dismiss plaintiff's complaint without taking jurisdiction of its subject matter under 8 U.S.C. 47(3) as to Counts 1 and 4 and 5?

D. REASONS FOR ALLOWING THE WRIT

First Reason: This Court should grant certiorari to reconcile the decision of the Fifth Circuit Court of Appeal here sought to be reviewed, with conflicting decisions of this Court, of other Circuit Courts of Appeal, and of District Courts.

The District Court in this case dismissed "for lack of federal jurisdiction." The Circuit Court of Appeals for the Fifth District in affirming the District Court says, "We leave undetermined the question of whether the complaint should have been dismissed for lack of federal jurisdiction." Since all the cases hereinafter cited decide that District Courts do have, or have taken, federal jurisdiction, we submit this decision is in error, and should be corrected.

This decision conflicts with other applicable decisions of this Court as to jurisdiction as follows:

Bell vs. Hood, 327 U.S. 678;

Binderup vs. Pathe Exchange, Inc., 263 U.S. 291;

Terry vs. Adams, _____U.S._____, (May 4, 1953);

Williams vs. United States, 341 U.S. 97;

Collins vs. Hardyman, 341 U.S. 651;

with applicable decisions of other United States Circuit Courts of Appeal, as follows:

Watkins vs. Oaklawn Jockey Club, 183 Fed (2) 440. Eighth Circuit Court of Appeals, 1949, affirmed Arkansas

District Court which took Jurisdiction under 8 U.S.C. 43.

McShane vs. Moldovan, 172 Fed. (2) 1016. Sixth Circuit Court of Appeals (1949). Reversed District Court and took jurisdiction under 8 U.S.C. 43.

Valle vs. Stengel, 176 Fed. (2) 697. Third Circuit Court of Appeals (1948) Reversed District Court of New Jersey in dismissing complaint and took jurisdiction under 8 U.S.C. 43.

Picking vs. Penn. Rr. Co., 151 Fed. (2) 240. Third Circuit Court of Appeals (1945), reversed District Court of Pennsylvania and took jurisdiction under 8 U.S.C. 43.

Battone vs. Lindsley, 170 Fed. (2) 705, Tenth Circuit Court of Appeals (1948), took jurisdiction as also did lower District Court under 8 U.S.C. 43 and 8 U.S.C. 47(3).

Mitchell vs. Greenough, 100 Fed. (2) 184. Ninth Circuit Court of Appeals (1938). Reversed Washington District Court and took jurisdiction under 8 U.S.C. 47 (3).

With applicable decisions of United States District Courts, as follows:

Allen vs. Corsano, 56 Fed. Sup. 170. District Court of Delaware (1944). District court held that it had jurisdiction under 8 U.S.C. 47 (3) but dismissed for failure to state a cause of action.

Robeson vs. Finelli, 94 Fed. Sup. 62. District Court of New York (1950) took jurisdiction under 8 U.S.C. 43 and under 8 U.S.C. 47 (3) as to some defendants and dismissed as to others.

Collins vs. Hardyman, 341 U.S. 651, started in California District Court which took jurisdiction and dismissed for failure to state a cause of action, 80 Fed. Sup. 501. Circuit Court of Appeals Ninth District reversed District Court saying there was a cause of action. 183 Fed (2) 308. The

point here is that both District Court and Circuit Court of Appeals took jurisdiction under 8 U.S.C. 47(3).

Second Reason: This court should grant certiorari because the decision of the Fifth Circuit Court of Appeals has decided an important question of local law probably in conflict with applicable local decisions:

> The Fifth Circuit Court in its opinion said, "In Moses vs. Tarwater 257, Ala. 368; 58 So. (2) 757, the Supreme Court of Alabama, one judge dissenting, sustained against a collateral attack by Habeas Corpus, the commitment of an allegedly insane person to the same institution, and under precisely the same statutes here involved. The State Circuit Judge before whom the Habeas Corpus proceeding originated sustained the constitutionality of the statutes. The Alabama Supreme Court found it unnecessary to pass upon the question of due process in order to sustain the commitment. We also refrain from determining that question."

We respectfully submit that this interpretation of Moses vs. Tarwater by the Fifth Circuit Court was in error. Dr. Moses was committed as an insane person to Bryce Insane Hospital under these same Alabama Insane Commitment statutes by the Probate Judge of Mobile County, Alabama. After a lapse of several years he filed habeas corpus proceedings as provided by Title 15, Sec. 3, Code of Alabama, before the Circuit Judge of Tuscaloosa County, Ala.

> Title 15, Sec. 3: "**Persons confined as insane.**—Any person confined as insane may prosecute a writ of habeas corpus as provided in this chapter; and if the judge, or the jury, when the petitioner demands the issues arising to be tried by a jury, shall decide at the hearing that the person is insane, such decision does

not bar a second application alleging that such person has been restored to sanity."

In this proceeding Doctor Moses sought his release upon the ground "your petitioner is sane and is entitled to liberty."

Dr. Moses likewise sought his discharge on the ground that the proceedings for his commitment in Mobile County, Alabama, were without notice to him and that he was denied due process of law. The statutes which the petition attacked are Title 45, Sections 208, 209 and 210, Code of Alabama, 1940. The basis of his contention is that Section 210 leaves the right to notice and hearing to the discretion of the Judge of Probate, ignoring the provision of the Constitutions, both State and Federal, that no person shall be deprived of his liberty without due process of law.

The habeas corpus hearing was before the Judge of the Alabama Sixth Circuit Court of Tuscaloosa County, Alabama, with a jury, and at the hearing the court and jury found that Dr. Moses was at that time insane and he was not discharged but was ordered remanded to the custody of the Superintendent of Bryce Insane Hospital, and the Habeas Corpus Writ was discharged.

Under the authorization of Title 15, Section 36a, Code of Alabama, the statement of facts and judgment required to be sent up with the record in Habeas Corpus appeal cases states in part as follows (page 757 of opinion):

> "The evidence was overwhelming that Dr. Moses was insane and should not be discharged and the jury so found, and the Court so adjudged and determined. This is a sad case, but the Court is convinced that the jury verdict is right and should be sustained both for the safety and well being of the public and of Dr. Moses."

At the Habeas Corpus hearing Judge Wright also denied Dr. Moses' contention as to due process and sustained the constitutionality of the statutes (Alabama Insane Commitment Statutes here questioned) and upheld the validity of the original commitment made by Probate Judge of Mobile County, Alabama.

Appeal was taken to the Supreme Court of Alabama from the ruling of the lower court on the Habeas Corpus hearing.

The decision, 25 So. (2) at p. 757 and 758 holds as follows:

> "It is familiar law that the constitutionality of a law will not be considered on appeal unless essential to the decision of the actual case before the court. Ex rel Knox vs. Dillard 196, Ala., 539 72 So. 56.
> "The judgment of the trial Judge remanding the petitioner to the custody of the Superintendent of Bryce Hospital is affirmed without prejudice. Code 1940, Title 15, Sec. 3, 25 Amer. Jur. 156, p. 250."

Since the Alabama Supreme Court "per curiam" sidestepped the constitutionality of these questioned statutes, then let us look into whether or not the construction placed upon Moses vs. Tarwater by the Fifth Circuit Court of Appeals is or is not probably in conflict with applicable local decisions.

The only applicable local decision is the full, long, learned, strong dissent opinion of Judge Brown. This is the sole and only Alabama Supreme Court comment or ruling of any kind as to the constitutionality of these Alabama Insane Commitment statutes. Judge Brown's opinion in short holds (58 So. 2, p. 763) that Sections 208, 209 and 210, Title 45, Code of Alabama 1940, are unconstitutional in that they violate due process rules of Fourth and Fourteenth Amendments to United States Constitution, as well as those of its Alabama Constitution in that these

statutes authorize ex parte examination without notice and a right to be heard followed by forced confinement without the consent of the individual whose liberty is taken from him.

The opinion further holds (page 764) that in the Habeas Corpus hearing appealed from Dr. Moses didn't have due process for that he was not given an equal opportunity to present medical testimony to support his petition and that his motion to set aside the jury verdict should have been granted and he should have been returned to Mobile County, Alabama, by the Hospital authorities and appropriate proceedings be had in a court of competent jurisdiction in said county as provided by Title 21, Article 2, Sections 9-15, Code of Alabama, within five days from the date the mandate issued by the clerk of this court. Otherwise the petitioner should be released and allowed to go hence.

Surely under view of this opinion of Judge Brown, although it is a dissenting opinion from a per curiam decision which refrained from construing a constitutional question raised in the case. And it being the sole and only Alabama Supreme Court **dictum** at all concerning the constitutionality of the Alabama Insane Commitment statutes, it is most probable that on **direct attack** these statutes would be declared unconstitutional.

The following list of cases also shows that other state insane commitment statutes similar to those of Alabama which do not afford notice and an opportunity to defend deny due process:

Urquhart vs. Brown, 205 U.S. 17 — (Washington)
Walters vs. McKinnis, 221 Fed. 746 (Pennsylvania)
Shields vs. Shields, 26 Fed. Sup. 211 (Missouri)
Bolmer vs. U.S. Fidelity & Guaranty Co., 11 Fed. Sup. 564 (Kentucky)
Slevat vs. Taylor, 111 Kentucky 247

In Re Petition of Michael Gannon, 5 L.R.A. 359 (Rhode Island)

Underwood vs. The People, 32 Michigan 1

Barry vs. Hall, 98 Fed(2) 222 District of Columbia

State vs. Billings, 55 Minnesota 467

Therefore, this Court should determine whether or not Plaintiff under the Alabama Insane Commitment Statute was denied due process of law and was deprived of her rights under the Constitution and Laws of the United States, and whether or not her incarceration was state action, and whether or not defendants were quasi state officers or **instruments causing state action** as this Court has decided in the Texas Jaybird Primary case.

Third Reason. This court should grant certiorari because the Fifth Circuit Court of Appeals has decided an important question of Federal Law which has not been, but which should be settled by this Court.

The Fifth Circuit Court of Appeals has decided that 8 U.S.C. 43 and 8 U.S.C. 47(3) do not afford "**individuals**" any right of action at a suit at law for money damages against "**other individuals**" when the "**other individuals,**" while not officers, cause or effect wrongs under color of state law or conspire to cause and effect such wrongs to the "**individuals**".

This Court should determine once for all whether or not 8 U.S.C. 43 is applicable as it reads, or if it is unconstitutional, and give to the said section exactly what legal status it rightfully should have. We find no decision or case or interpretation of 8 U.S.C. 43, and this Court should determine what the law is as regards 8 U.S.C. 43 and its effect.

In Williams vs. U.S., 341 U.S. 97, the Court had under consideration 18 U.S.C. 242, which is the criminal com-

panion statute of civil statute 8 U.S.C. 43. In that case Williams who held a special officer's card issued by the City of Miami, Florida, but with no official status as a Miami police officer, with others sought to obtain a confession by brutal methods. This Court upheld a conviction. This case, as we interpret it, intimates that any private individual acting under color of law may be criminally punished.

We submit that if Williams, a private detective, and not connected with state or city authority as an officer, could be convicted under 18 U.S.C. 242 of wilful deprivation of rights, privileges, or immunities protected or secured by the Constitution and Laws of the United States in a criminal case, where proof beyond a reasonable doubt and to a moral certainty is required, certainly the defendants in this case are subject to being sued civilly under the companion civil statute, 8 U.S.C. 43.

There was one case as to 8 U.S.C. 47(3) decided by this Court, viz, Collins vs. Hardyman, 341 U.S. 651, up to the Texas Jaybird Primary Case, Terry vs. Adams, not yet reported but decided by this Court on May 4, 1953, which began in a Texas District Court in a suit for damages under civil rights statutes (damages remitted at trial). This Court should determine once for all whether or not individuals are amenable under 8 U.S.C. 47(3) to other individuals.

This Court in Collins vs. Hardyman, 341 U.S. 651, expressly refrained from passing on constitutional questions (see Terry vs. Adams, _____U.S._____, decided May 4, 1953, on page 4 of Justice Clark's concurring opinion), and this question should be determined, especially since Terry vs. Adams seems to overthrow Collins vs. Hardyman. See also Rice vs. Elmore, 165 F(2d) 387, and Baskin vs. Brown, 174 F2d 301. Therefore we say this Court should grant certiorari and determine fully just what the wording of 8 U.S.C. 43 and 47(3) means, to whom applicable, and un-

der what circumstances those covered by said sections are amenable and are protected.

Fourth Reason. This Court should grant certiorari because the decision of the Fifth Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

To dismiss a complaint for failure to state a cause of action is clearly against Binderup vs. Pathe Exchange, Inc., 262 U.S. 291, and clearly against Bell vs. Hood, 327 U. S. 678.

The decision of the Fifth Circuit Court of Appeals herein sought to be reviewed dismissed the complaint for failure to state a cause of action under 8 U.S.C. 43 and 8 U.S.C. 47(3). The counts of the complaint include everything set forth in said Sections 8 U.S.C. 43 and 8 U.S.C. 47(3). Since the counts contain every allegation which the respective sections require, this Court should determine whether or not the complaint states a cause of action under Federal Procedure.

To dismiss a complaint for lack of federal jurisdiction as did the District Court in this case before the Court, and to affirm the ruling of the District Court and pointedly say that the lack of federal jurisdiction was left undetermined, as was said by the Fifth Circuit Court of Appeals in this case, is clearly against the rulings of this Court. Binderup vs. Pathe Exchange, Inc., supra, and Bell vs. Hood, supra., and Terry vs. Adams, supra.

The decision of the Fifth Circuit Court of Appeals herein sought to be reviewed, left undetermined the question of whether or not the District Court had jurisdiction, and such question should be determined by this Court.

Fifth Reason. This Court should grant certiorari because the decision of the Fifth Circuit Court of Appeals

has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

The District Court specifically dismissed this cause on the ground that it did not have jurisdiction. In the case of Mitchell vs. Greenough, et al. (9th Circuit), 100 F2d 184, the Court held that in such cases the Court does have jurisdiction, and that a dismissal by the Judge on the ground he did not have jurisdiction was erroneous.

The Fifth Circuit Court of Appeals has in its decision left undetermined whether or not the District Court had federal jurisdiction. **Such a ruling is contrary to the holding in all the other cases cited in this petition and argument.**

The Fifth Circuit Court of Appeals has sanctioned the District Court in following such departures.

A supporting argument accompanies this petition.

Wherefore, your petitioner, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, commanding that Court to certify and send to the Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Fifth Circuit may be reversed by this Court; and that your Petitioner may have such other and further relief in the premises as may seem just and proper.

WALTER J. KNABE
511 Hill Building
Montgomery, Alabama
Attorney for Petitioner

Of Counsel:
W. R. Martin
Ozark, Alabama

APPENDIX

The parts of Code of Alabama of 1940, Title 45, Section 208, 209 and 210 which are deemed necessary to the decision of this case are printed at length hereinafter.

Code of Alabama, 1940:

"Section 208: Application to and of probate judge for admission of patient; contents of:—When a relative, friend, or other party interested desires to place a person as a patient in one of the state hospitals, he shall apply to the judge of probate of the county in which the person resides, and the judge of probate, without delay, shall investigate the case, by examining witnesses, or not, as he sees fit, and, if he is reasonably convinced that the case is a suitable one, he shall make application to the superintendent at Tuscaloosa for his, or her admission, and shall accompany his application with as full and as explicit answers as possible to the following interrogatories describing the case: What is the person's name in full? Weight? Age? Sex? Post-office? Occupation? Single or married? Race? Color? Where born? Names and addresses of correspondents? How long has patient's mental abnormality existed? Has the person epileptic convulsions? Can his impaired mental condition be attributed to the injurious use of alcohol? Or opiates? Or tobacco? Or any other drug? Did the present condition begin suddenly? Or come on gradually? Has the person ever exhibited conditions of mental abnormality of any grade before this? Has the person, because of mental deficiency or defectiveness ever been confined in a poor house or jail? Where was the person ever a patient in an insane hospital? When? Is the person hard to control? What means of restraint have been used? How does the person's insanity exhibit itself? What wrong ideas does he hold? In what way is he (or she) troublesome or dangerous? Is he indecent in his talk or habits? How is he (or she) uncleanly? How has he attempted to destroy

property? How well does he attend to work? Or to business? What is the alleged cause of his insanity? What near relatives of the patient have been wrong mentally? Is the person deaf? Dumb? Blind? Lame? Maimed? Paralyzed? Or helpless? How is he (or she) sick or diseased, otherwise than mentally so? How much confined in bed? Will the person be an indigent or a paying patient?***"

"Section 209: Reply to application for admission.—On receipt of the application of the judge of probate and the answers to the foregoing interrogatories describing the case, the superintendent shall promptly forward a reply, stating whether there is room in the hospital for that class of a patient, and to which hospital he shall be sent."

"Section 210: Certificate of probate judge for admission of patient; form and contents of.—When informed by the superintendent that the person can be received as a patient, the judge of probate shall examine witnesses, at least one of whom shall be a physician, and fully investigate the facts of the case, either with or without a jury, and either with or without the presence in court of the person, the grade of whose mental disqualifications is under investigation, according to his discretion; and if the judge, or the jury, as the case may be, believe that the person is sufficiently defective mentally to be sent as a patient to a hospital for insane persons, the judge of probate shall make two copies of a certificate of mental disqualification, one copy of which shall be filed in his office and the other he shall send with the patient to the hospital; which certificate shall read substantially as follows: I (A.B.), judge of probate of the county of_____, and the State of Alabama, do hereby certify that it having been alleged to me that C.D., a resident of this county, is insane, and that his (or her) own and the public welfare demand that he (or she) be sent to the hospital for insane persons for custody and treatment, pursuant to the statutory provisions

in such cases, I have called before me the following credible witnesses (giving their names) and Dr._____, a reputable physician, practicing medicine in the state and having examined them under oath and otherwise fully investigated the facts of the case, with the said C. D., present in court (or not as the case may be), I do hereby certify that sufficient proof has been adduced before me (or the jury) to satisfactorily show that the said C. D. is so defective mentally that he (or she) ought to be committed to the hospital for insane persons for safekeeping and treatment. I further certify that satisfactory proof has been adduced before me (or the jury) that the said C. D. has (or has not) sufficient means to pay his (or her) expenses in the hospital. I therefore issue this certificate of mental disqualification and commit him (or her) to the_____ hospital at_____, according to instructions received from the superintendent, as indigent (or paying) patient. Given under my hand at_____, in the county and state aforesaid, this the_____day of_____, in the year_____(A.B.). Probate Judge.****"

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No._____

FANNIE MAE WHITTINGTON,
Petitioner,

vs.

DR. JOHN D. JOHNSTON, ET AL.,
Respondents.

BRIEF IN SUPPORT OF THE PETITION

The four parts of this brief correspond to the four groups of reasons set forth under Questions Presented in Part C of the foregoing Petition for Certiorari.

Part 1 – Jurisdiction of United States District Courts

Since there are two separate and distinct causes of action in the complaint, 8 U.S.C. 43 and 8 U.S.C. 47(3), we propose to speak of them separately.

The United States District Courts do have and should take jurisdiction of complaints based upon 8 U.S.C. 43.

Watkins vs. Oaklawn Jockey Club, 183 F2 440

McShane vs. Moldovan, 172 F2 1016

Picking vs. Penn RR. Co., 151 F2 240

Valle vs. Stengel, 176 F2 697

Bottone vs. Lindsley, 170 F2 705.

Also applicable to the federal jurisdiction and to other questions are the following cases; viz.

Bell vs. Hood, 327 U.S. 678 (1946)

Terry vs. Adams .....U.S..... (May 4, 1953)

These cases are also applicable to questions raised as to 8 U.S.C. 47 (3).

The lower court held that 8 U.S.C. 43 does not cover acts by an individual under color of state laws. We submit that it does. Without question counts 2 and 3 of the complaint accuse defendants of acting under color of law and of unlawfully using state statutes to deprive plaintiff under color of such state laws of rights guaranteed to her under the Constitution of the United States. The complaint states a cause of action under the Constitution and laws of the Unied States. Everything specified in the appropriate section was included in the several counts of the complaint. The lower court sought to answer this as to counts 2 and 3 under 8 U.S.C. 43 by holding that despite the fact that the counts include everything set forth in that section nevertheless the counts fail to state a cause of action because no allegations were made that the perpetrators of the wrong were officers.

One of the basic elements of 8 U.S.C. 43 is that the wrongs complained of must have been done under color of some law and that those charged must have done or caused to be done that wrong.

U. S. vs. Classic, 313 U.S. 299, and Screws vs. U.S., 325 U.S. 91 are the two leading cases which settled the question of "Color of Law" The Classic case held as to Sec. 20 of Criminal Code (now 18 U.S.C. 242) that "misuse of power, possessed by virtue of State Law and made possible only because the wrongdoer is clothed with authority of State Law is action taken under color of state law." The Screws case holds that under "color" of law means under "pretense" of law, and approved and reaffirmed the principles of the Classic case. This rule of law has become the basis of federal enforcement in this important field.

8 U.S.C. 43 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. Sec. 1979."

We cannot find any case where the United States Supreme Court or any lower Federal Court has passed upon this question of bringing a civil suit for damages under this section. However, we do have some cases under its companion statute, 18 U.S.C. 242, which reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed

for the punishment of citizens shall be fined not more than $1,000 or imprisoned not more than one year, or both."

As recently as January 1951 the Supreme Court, in Williams vs. U.S., 341 U.S. 97, 95 L. Ed. 774, 71 S. Ct. 576, has affirmed the Classic rule and quoted it as being the definition of "under color of law."

Taking, then, the definition of "under color of law" as being "misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," the question is then presented whether such a definition can be applied to a private individual who is not an official of the state. Both the Classic case and the Screws case involved the criminal prosecution of individuals who were state officials, so the question of whether a private individual may so act that his action constitutes action taken under color of law was not presented. However, the decision of the Court of Appeals for the Fifth Circuit in Williams vs. U.S., 179 F. 2d. 656 and the decision of this Court in Williams vs. U.S., 341 U.S. 97, 95 L. Ed. 774, 71 S. Ct. 576 have provided the answer to the problem.

This Court in the Williams vs. U. S., was faced with the problem of determining whether or not Williams, who possessed a policeman's card from the City of Miami and who performed the proscribed acts in the presence of a duly constituted policeman sent to the scene, was acting under color of law. This Court said (on page 99-100):

"We think it clear that petitioner was acting 'under color' of law within the meaning of Section 20, or at least that the jury could properly so find. We interpreted this phrase of Section 20 in United States vs. Classic, 313 U.S. 299, 326, 85 L. Ed. 1368, 1383, 61 S. Ct. 1031, 'misuse of power, possessed by virtue of state

law and made possible only because the wrongdoer is clothed with the authority of state law,' is action taken 'under color of state law.' And see Screws vs. United States, supra (325 U. S. 107-111, 89 L. Ed. 1505-1508, 65 S. Ct. 1031, 162 ALR 1330). It is common practice, as we noted in National Labor Relations Board vs. Jones & Laughlin Steel Corp., 331 U.S. 416, 429, 91 L. Ed. 1575, 1583, 67 S. Ct. 1274, for private guards or detectives to be vested with policeman's powers. We know from the record that that is the policy of Miami, Florida. Moreover, this was an investigation conducted under the aegis of the state as evidenced by the fact that a regular police officer was detailed to attend it. We need go no further to conclude that the lower court to whom we give deference on local law matters, see Gardner vs. New Jersey, 329 U. S. 565, 583, 91 L. Ed. 504, 520, 67 S. Ct. 467, was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person."

Thus the rule is evolved that a private individual may act under color of law when his action is under some pretense of authority bestowed upon the individual by the state or when his action is sanctioned in some way by the state. So when an individual makes use of a token of authority given him by the state, such as a policeman's card, he is acting under pretense of state authority and thus under color of law. Also when an individual acts in the presence of, and with the approval of, a duly constituted state officer, the individual acts under the sanction of the state and thus his acts constitute acts done under color of law. This rule has been recognized in U. S. vs. Lynch,

94 F. Supp. 1011. The District Court stated (on page 1013):

"It was insisted by movants that the six named defendants who were not officers of the state could not violate this civil rights statute because it related only to deprivations by a state. True, Section 242 was enacted pursuant to the 14th Amendment and relates to deprivation by states (acting through state officials) and not to acts of private individuals. It does not follow, however, that private individuals cannot be guilty as principals if they aid and abet state officers in such violations. Section 2, Title 18, United States Code annotated.

"Thus, in the case of United States vs. Trierweiler, D.C., 52 F. Supp. 4, the court pointed out that it is immaterial that a private citizen may not have the capacity to commit the offense, if he aids an officer to do so. In other civil rights cases under Section 242 private individuals have been joined as defendants. Williams vs. United States, 5th Cir. 179 F. 2d. 644, Williams vs. United States, 5th Cir. 179 F. 2d. 656."

The District Court further stated (on page 1014):

"While it is true that one must be acting under color of state law in order to violate Section 242, and that ordinarily a private citizen would not act under color of law, it is also true that the presence of state officers and their active participation with other defendants who were not officers would furnish the "color of law" required as to all defendants. This is ruled in Williams vs. United States, 5 Circ., 179 F. 2d. 656, 658, involving a conviction under Section 242."

The interpretation of action under color of law as given by the courts in cases involving 18 U.S.C. 242 is

applicable also in cases involving 8 U.S.C. 43. As stated in Picking vs. Pennsylvania R. Co., 151 F. 2d. 240, 248:

> "The operative language of R.S. Section 1979 (8 U.S.C. 43), insofar as is material to the issues presented by this phase of the instant case, is identical with that of Section 20 of the Criminal Code (now 18 U.S.C. 242). It follows that R. S. Section 1979 must be construed as in pari materia with Section 20. The phrase 'under color of any statute . . . ' employed in R. S. Section 1979 must be construed as was the phrase 'under color of any law' in the Screws case." (parentheses added).

It is therefore established that a private individual may act under color of law.

In the case of Williams vs. United States, 179 F2d 656 (5th Circuit) affirmed by Williams vs. U. S., 341 U.S. 97 the United States Supreme Court held that Williams, an individual, in working through state officers with a badge as a special policeman of Miami, Florida, was subject to being convicted alone for violation of 18 U.S.C. 242. Williams was clearly an individual and acting as an individual, but acting under color of state law. In this case it is alleged that the defendants were individuals, but were acting under color of state law and they certainly had to act with and through state officers in having plaintiff adjudicated insane, ordered committed to the Bryce Insane Hospital (the state insane asylum), and arrested and confined to jail from January 5th to 9th, 1951, in Pike County Alabama.

We submit that if Williams, an individual and not an officer, could be convicted under 18 U.S.C. 242 of wilful deprivation of rights, privileges, or immunities protected or secured by the Constitution and Laws of the United States in a criminal case, where proof beyond a reasonable doubt and to a moral certainty is required, certainly the

defendants in this case are subject to being sued civilly under the companion civil statute, 8 U.S.C. 43.

In the case of Bottone vs. Lindsley 170 Fed (2) 705, Tenth Circuit (1948) in a case brought exactly as was our case under both 8 U.S.C. 43 and 8 U.S.C. 47 (3) the Circuit Court speaking through Murrah, Judge holds as follows:

> This is a suit filed in the United States District Court of Colorado for damages by Appellant, Joseph Bottone, under the so-called Civil Rights Act, Sections 43 and 47, Title 8, U.S.C.A. R.S. No. 1979, 1980 against the administrator of the Estate of Acquelene Batton, deceased, and the lawyers and judge who participated in a suit unsuccessfully prosecuted by this appellant in the (State) District Court of the State of Colorado. The Complaint alleges that by the State Court proceedings the defendants conspired to deprive him of his property and without due process of law, and of the equal protection of the law in violation of the Foureenth Amendment to the Constitution of the United States.
>
> The Federal District Court sustained a motion to dismiss on the grounds that the complaint did not state facts sufficient to constitute a claim upon which relief could be granted, and thus appeal is from a judgment for the defendants.
>
> Section 43, Title 8, U.S.C.A. gives a right of action against every person, who, under color of law, deprives any person within the Jurisdiction of the United States of any right, privilege or immunity secured by the Constitution and Laws of the United States. Section 47, in material part, grants a right of action for conspiracy to deny any citizen the equal protection of the laws.

The Fourteenth Amendment to the Constitution of the United States secures every person against deprivation of life, liberty, or property without due process of law, or denial of the equal protection of the laws.

But Sections 43 and 47 grant separate and distinct rights of action. Section 43 does not give a cause of action for denial of equal protection of the laws, nor does Section 47 give a cause of action for denial of due process of law.

It is alleged, however, that in the performance of the acts complained of, each of the defendants acted as an officer of the Colorado State Court, and for the purpose of considering the legal sufficiency of the complaint, we will assume the legal premise that the Judge and lawyers acted under color of State Law.

It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes the State Court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law.

In our case now before the Court we submit that the adjudication of plaintiff to be an insane person and the order of her incarceration in the Bryce Insane Hospital as was done in this instance through action of the Probate Judge of Pike County, Alabama, caused and motivated by defendants was a complete nullity as plaintiff did not have due process of law as is set out in cases cited hereinafter in this Brief.

The Court of Appeals of the Fifth District, in its opinion, holds that only officers can act under color of law, and we submit that again the Court of Appeals has erred. If Congress had intended that only officers could act under color of law, it would as hereinabove pointed out, have specified officers. It is true that most cases so far presented include officers or persons acting as officers. That is only because that is an easy way to act under color of law. But that is not the only way of acting under color of law. If a man goes to a house and says, "Open the door, or I will shoot through the window," and the occupant opens the door from fear, and is subsequently beaten, that is a private wrong. But if the same man says, "Open the door, I'm an officer of the State," and the occupant opens the door, that is a wrong which should be cognizable under 8 U.S.C.A. 43. That is under color of law. The wrongdoer has used the power of the State to accomplish the wrong.

That is only one way in which the power of the State is used. In the instant case, an actual statute of the State was used. The Complainant alleges that the respondents wrongfully used a statute, knowing that by using it in the way they planned, they could accomplish their wrong. They deliberately added such fraud as was necessary to make the statute accomplish their end. They were definitely acting under color of law. They came within the purview of the statute.

If the wrongdoer is an officer or represents himself to be an officer, the wrong is within the statute, but a person not an officer can still use the power of the State and be within the provisions of the act.

However, even taking the Court of Appeal's interpretation of 8 U.S.C.A. 43 in the instant case, we still submit the opinion is in error, because the Alabama Statute makes the respondents officers. The Alabama Statute definitely provides that the way the process is set in motion is by

action taken by certain individuals, a kinsman or a friend and a doctor, as were defendants here. The provisions of the statute itself thus make such persons officers or quasi-officers. They were acting in an official capacity. They come within the provisions of 8 U.S.C.A. 43.

It is to be noted that 8 U.S.C. 43 not only covers a direct subjection to a deprivation of constitutional rights but also covers the situation where a person "causes to be subjected" another person to a deprivation of constitutional rights. Thus far in this brief only the direct actions amounting to a deprivation of constitutional rights have been considered. It is now necessary to ascertain the meaning and scope of the phrase "causes to be subjected." As was stated by Judge Rives in his dissenting Opinion in Whittington vs. Johnston, 201 F. 2d. 310, (R. 4):

> "Some meaning must be ascribed to the phrase 'or causes to be subjected' ".

The meaning of this particular phrase from 8 U.S.C. 43 was discussed in Watkins vs. Oaklawn Jockey Club, 86 F. Supp. 1006, affirmed by the Court of Appeals for the 8th Circuit, 183 F. 2d. 440. In holding that a claim was stated against the defendant, Oaklawn Jockey Club, the District Court said (on page 1016-1017):

> "Section 43 does not in so many words grant a cause of action for a conspiracy to deprive one of his liberty without due process, but it is the opinion of the Court that the language, 'subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,' covers the situation whereby two or more persons conspire or agree to deprive another of a constitutional right and that conspiracy or agreement is actually executed by a party to the agreement acting under color of state law."

Other cases have also held that a claim is stated where the complaint alleges in substance that a corporation or an individual conspired with state officials to deprive the plaintiff of constitutional rights and that such conspiracy was actually carried out by the state officials acting under color of state law.

In Picking vs. Pennsylvania R. Co., 151 F. 2d. 240, the corporate defendant moved to dismiss a complaint which sought to state a claim under Section 43. The motion was denied and the Court stated (on page 249-250):

> "The corporate defendant, the Pennsylvania Railroad Company, however, is not an agency of any state. It is a privately owned railroad corporation. It has moved to dismiss the complaint upon the ground inter alia, that 'There is nothing in the allegations of the Complaint that the Pennsylvania Railroad Company did other than transport as a common carrier the complainants while in the custody of officers of the law.' But, if, as the plaintiffs assert, the defendant 'materially and physically participated in' all the alleged unlawful acts of September 15, 1951, it may have joined in, or as the plaintiffs put it, 'adopted' the conspiracy as its own."

The Court then concluded that the plaintiffs had stated a valid cause of action under the Civil Rights Act against the private corporation.

In McShane vs. Moldovan, 172 F. 2d. 1016, the Court of Appeals for the Third Circuit stated that the issue before the Court was:

> "Whether a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment and resulting in deprivation of such rights gives rise to an action for

damages against the conspirators under Title 8 U.S.C. Sections 43 and 47."

The Court discussed the Classic and Screws cases and then said (on page 1021):

"Since the Screws case, the same question has come before the Circuit Court of Appeals for the Third Circuit in Picking vs. Pennsylvania R. Co., 151 F. 2d. 240, certiorari denied 322 U.S. 776, 68 S. Ct. .38. That case was decided squarely upon the provision of the statute that is before us in this case, 8 U.S.C.A. Section 43. The complaint had asserted that individual defendants who were officers either of the state of Pennsylvania or New York, together with a third party, entered into a conspiracy to deprive plaintiffs of their liberties without due process of law, which was consummated by arresting and imprisoning them in violation of the laws of both Pennsylvania and New York. The district court held that the complaint failed to state a cause of action. On review by the circuit court of appeals, the district court was reversed. In delivering the opinion on appeal, Judge Biggs observed that (151 F. 2d. 248): 'It was thought that, absent diversity of citizenship, the federal courts did not have jurisdiction to enjoin action by officers of agencies of a state in violation of the Fourteenth Amendment when the so-called state action was prohibited by state law.' The Court then went on to review Screws vs. United States, supra, and United States vs. Classic, supra, stating that there was no question now as to the sufficiency of the statute to grant a right of civil action, and held that by the provisions of Title 8 U.S.C.A. Section 43, 'Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by an officer acting under pretense of state law.' The Court concluded that the plaintiff had

stated a cause of action under the statute in alleging that the state officials had conspired with another to deprive the appellant of her rights under the Fourteenth Amendment, under color of law."

Having made this exhaustive examination of the law, the Court reached the conclusion that (on page 1023):

> "The allegations of the complaint in the instant case charged state officers and others with combining in a willful and malicious conspiracy to deprive appellant of the rights secured to her by the Fourteenth Amendment. They charged that these persons, pursuant to such conspiracy, unlawfully arrested and imprisoned appellant and subjected her to a fraudulent criminal trial; and that, in carrying out their conspiracy in this way, they acted under color of the laws of Michigan. It was further asserted in the complaint that, as a result of such conduct carried out under color of the laws of Michigan, appellant was deprived of the constitutional rights secured to her by the Fourteenth Amendment. In the light of the authorities above set forth, we are of the opinion that the allegations of the complaint stated a cause of action over which the district court had jurisdiction."

In Valle vs. Stengel, 176 F. 2d. 697, the Court of Appeals for the Third Circuit was again concerned with whether a complaint stated a cause of action as against police officer, Stengel, and as against a corporate defendant. The Court stated (on page 702):

> " . . . since the complaint alleges in effect that he (the police officer) aided and abetted the corporate defendant and the managing defendants, his actions may be attributed to them and treated as their own." (parentheses added).

The Court concluded its opinion by stating:

"The complaint does state a cause of action because it alleges that civil rights guaranteed to the plaintiffs by the Fourteenth Amendment and protected by the Civil Rights Act were invaded by Stengel acting under color of state law. The other individual defendants and the corporate defendant should be kept in the case as parties at this state of the proceedings. The corporate defendant can act only through its agents, the individual defendants other than Stengel and it is alleged that the other individual defendants caused Stengel's actions of which the plantiffs complained. It is probable that the status of corporate and individual liability will become much plainer when evidence is offered."

Thus, without a holding to the contrary, all Courts which have dealt with the problem have determined that a claim is stated where the complaint alleges a conspiracy entered into with state officials to deprive the plaintiff of constitutional rights and such conspiracy actually carried out by the state officials acting under color of law, or where it is alleged that a corporate or individual defendant aided and abetted and caused the acts of the state officials which deprived the plaintiff of his constitutional rights, or where it is alleged that a corporate or individual defendant materially and physically participated in the alleged unlawful acts.

It is to be noted that it is essential that the conspiracy be actually carried out by one of the conspirators acting under color of law. The mere conspiracy itself does not give rise to an action under Section 43. In applying the language of the decided cases to the allegations of the complaint in the case at bar it is clear that a claim for relief is stated by the allegation that the defendants caused to be subjected the plaintiff to a deprivation of her constitutional rights, and by the allegation that the defendants conspired and

caused state officials to deprive the plaintiff of her constitutional rights and that such conspiracy was actually carried out by the state officials acting under color of law.

No doubt the phrase "causes to be subjected" was intended to cover a situation where a private individual becomes so powerful that he can corrupt and use the power of the state for his own illegal undertakings.

A district court must take jurisdiction over the subject matter where a complaint claims a right to recover under the constitution and laws of the United States.

Part 2 – Conspiracy Counts 1, 4 and 5, Under 8 U.S.C. 47(3)

The first conspiracy count does not allege that plaintiff was sane at the time of the acts complained of, but does allege that she was sane immediately thereafter. In the opinion of plaintiff, it was not necessary to allege that she was sane or insane. It is the contention of the plaintiff that an insane person can be incarcerated without due process of law just as a sane person can be incarcerated without due process of law.

An insane person might not be injured as greatly or as greviously as a sane person, and the measure of damages might not be as large as if that person were sane. But that insane person's liberty would be just as greatly impaired as if the person were sane. An insane person actually is entitled to more protection of the law than a sane person in like circumstances.

In the case of **Dexter vs. Hall**, 82 U.S. 9, the Supreme Court of the United States speaking through Mr. Justice Strong, on page 25, says:

> "The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is a difference between the situation and acts of infants and lunatics. Both classes of persons are regarded

as under the protection of the law. But as already remarked a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degrec. With a lunatic it is wanting altogether."

However, to obviate any question on this point, plaintiff in the instant case added additional conspiracy counts setting forth that she was sane at the time of the acts complained of.

Plaintiff submits that 8 U.S.C. 47(3) authorizes the bringing of a case under conspiracy counts. This section provides in part:

"If two or more persons in any state or territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law . . . "

the party injured by such actions, may have an action for the recovery of damages against any one or more of the conspirators. **Hardyman vs. Collins,** (1950, CCA9th Cal) 183 F2d 308, revd. on other grounds 341 U.S. 651, 95 L Ed 1253, 71 S. Ct. 937; **Robeson vs. Finelli,** (1950, DC NY) 94 F. Supp. 62; **Allen vs. Corsano,** 56 Fed. Supp. 169; **Bottone vs. Lindsley,** 170 F2d 705; **Mitchell vs. Greenough,** 100 F2d 185; **Terry vs. Adams,** ____U.S.____, (May 4, 1953).

The dissenting opinion in the Hardyman case goes further than is required in the present instance. The dissent expressed the opinion that 8 U.S.C. 47(3) creates a cause of action in favor of persons injured by private individuals through the abridgement of federally created rights. While the majority opinion does not go this far, it still holds than an individual is protected against acts by private parties if the right is guaranteed by the Federal Constitution, but that the facts of that particular case do not show such a conspiracy.

Plaintiff respectfully submits that the conspiracy counts should not have been dismissed by the Court, and that the Court erred in dismissing them.

The Fifth Circuit Court of Appeals' opinion holds that no conspiracy is alleged within the contemplation of 8 U.S.C.A. 47(3) because the conspiracy alleged does not deprive its object of equal privileges, protection and immunities under the law. We submit that counts 1, 4 and 5 do make such allegations. The Alabama Insane Commitment Statutes set up a class, to which they deny equal protection, a class of persons who may be adjudged insane, and may be incarcerated as insane without notice and the opportunity to be heard. No others, except in a narrow class, are denied the right of notice and an opportunity to be heard in any proceeding.

In this case, complainant alleges that the respondents, knowing that they could deprive Complainant of privileges guaranteed under the Constitution conspired to and did deliberately act in such a way, that is, by conspiring to secure a false affidavit, that she was deprived of rights guaranteed to her under the Federal Constitution. Terry vs. Adams, known as Texas Jaybird Primary Case, surely has established the rule that individuals can cause state action.

The opinion of the Fifth Circuit Court of Appeals holds that Complainant has no cause of action because respondents were not officers of the law. We submit that this is in error for the following reasons:

The section under which the action is brought, does not require the perpetrator to be an officer. The plain wording of the act is "Every person." This includes others besides officers, and to hold that it does not, disregards the clear wording of the section.

If Congress had intended what the opinion holds, it would have provided, "Any officer or person representing

himself to be an officer." Surely the words "every person" include private citizens as well as officers.

That Congress did not intend to limit it to officers, is indicated by the words of the Statute and by the fact that the enactment was designed to curb the Ku Klux Klan. In fact, it is known as the "Ku Klux Act." The Klansmen did not represent themselves as being officers. That organization was in existence because the members felt the Courts and officers had failed. Surely Congress did not pass specific legislation primarily to meet the activities of one group, with the intention that it be so construed as to include that specific group only when they represented themselves to be part of the very government which they were attempting to replace. Obviously, Congress intended it to cover every klansman and every other "Person" who violated it. So we submit that the opinion of the Fifth Circuit Court of Appeals does violence to the language and to the obvious intent of the statute. It is judicial legislation for the Court to read the word "person" as the word "officer."

United States District Courts do have and should take jurisdiction of complaints based upon 8 U.S.C. 47(3), as is held by the following cases:

Terry vs. Adams, decided by this Court May 4, 1953.

Mitchell vs. Greenough, 100 F2d 185, Ninth Circuit Court of Appeals (1938), reversed District Court's decision in dismissing the complaint for lack of federal jurisdiction. 8 U.S.C. 47(3). The Court of Appeals speaking through Welbur, Circuit Judge, says:

> "Inasmuch as the only cause of action alleged is one under the statute (8 U.S.C.A. 47) such claim is not without color. The District Court had jurisdiction of an action founded upon a federal statute and consequently had jurisdiction to decide that plaintiff had failed to state a cause of action under that statute.***

"Judgment of dismissal for want of jurisdiction is reversed and the case is remanded to the trial court, with instructions to dismiss the case for reason that the complaint does not state a cause of action and that the action is barred by the statute of limitations."

Bottone vs. Lindsley, 170 F2d 705, Tenth Circuit Court of Appeals (1948) was filed in District Court under Civil Rights Act, 8 U.S.C. 47(3), and also under 8 U.S.C. 43, as was our case before the Court. The case is set out at length heretofore in discussion of Counts 2 and 3 of the complaint and will not here be shown further. It applies, however, likewise to Counts 1 and 4 and 5 of the complaint.

In Allen vs. Corsano, 56 Fed. Supp. 169 (1944), Allen sued Justice of the Peace Frank Corsano to recover damages, alleging that Justice of the Peace would not issue process for him against one Edward R. Kingey for a labor lien (joined state officer and private individual). He asserted that he was damaged by Corsano and others conspiring to deny him equal protection of the law. Corsano alone was sued, although others were alleged to have joined in the conspiracy.

The Court, Leahy, District Judge, held that although his claim was not under Civil Rights jurisdiction, and he had adequate state remedies, as would any citizen of the State, and that his suit was not equal protection of the law, nevertheless:

"Inasmuch, however, as the only cause of action alleged is one under that statute (U.S.C.A. 47(3)) such claim is 'not without color'. The District Court had jurisdiction of the action founded upon a federal statute and consequently had jurisdiction to decide that the plaintiff had failed to state a cause of action under that statute."

In he case of Robeson vs. Finelli, 94 Fed. Sup. 62, in the District Court of New York (1950) Paul Robeson and 27 other plaintiffs filed against Finelli and 15 other defendants under the Civil Rights Act, Sections 8 U.S.C. 43 and 8 U.S.C. 47 (3). The Court held that defendants came in two classes (1) Individuals and (2) Officers. The Court also held that complaint was divisible into a number of separate types of claims distinct with respect to the legal principles each invokes. In all but one instance the same claims are alleged on behalf of more than one plantiff.

The Court further held that some claims are valid against "individuals" and some are not and that some likewise are valid against officers and some are valid against both individuals and officers. And the Court distinguishes them. The Court held that though the fourth typical claim, previously considered, is directed only against "individuals", it also states a valid claim under Section 43. The "individuals" are said to have conspired with the "officials." When, because of the participation of "officials", action is taken which may be characterized as effecting a deprivation "under color of state law" of rights secured by the Constitution, the "individuals" also fall within the structure of Section 43."

The case of Collins vs. Hardyman, 341 U.S. 651, began in the District Court of the Southern District of California, 80 Fed. Sup. 501. As we interpret the case the District Court took jurisdiction but dismissed the case because the complaint failed to state a cause of action. No. mention was made of "lack of Federal Jurisdiction."

The Court of Appeals of the Ninth Circuit (183 Fed. 2. 308) reversed the District Court saying that the Complaint did state a cause of action. Likewise in their decision no mention was made of any "lack of Federal Jurisdiction", so we interpret the Court as having been of the opinion that Federal Jurisdiction had been acquired.

The United States Supreme Court 341 U. S. 651 speaking through Mr. Justice Jackson, reversed the Circuit Court of Appeals of the Ninth District and says:

> "We say nothing of the power of Congress to authorize such civil action as respondents have commenced or otherwise to redress such grievances as they assert. We think that Congress has not, in the narrow class of conspiracies defined by this statute, included the conspiracy charged here. We therefore reach no constitutional question. The facts alleged fall short of a conspiracy to alter, impair, or deny equally of rights under the law though they do show a lawless invasion of rights for which there are remedies in the law of California. It is not for this Court to compete with Congress or attempt to replace it as the Nation's law-making body."

The judgment of the Court of Appeals was reversed. The United States Supreme Court in its decision did not go into the question of "lack of Federal Jurisdiction". From all three decisions we therefore interpret each Court—District, Court of Appeals of the Ninth Circuit and the United States Supreme Court—as having no doubt that there was Federal Jurisdiction under the allegations and pleadings of the Bill of Complaint in Collins vs. Hardyman.

In Bell vs. Hood, 327 U.S. 678, the United States Supreme Court held before it a complaint by an individual seeking damages against members of the F.B.I. in their individual capacities under Civil Rights statutes under due process of law and other grounds. The District Court of Washington had dismissed for lack of Federal jurisdiction. The Ninth Circuit Court of Appeals affirmed, 150 Fed. 2 96. This Court granted certiorari and reversed the Ninth District Court of Appeals, saying that the District Court did have jurisdiction and that plaintiff's right to recover depended upon the later and timely construction of 28

U.S.C. 41 (1), and on the scope of the Fourth and Fifth Amendments.

In Rue vs. Elmore, 165 F2d 387, and in Baskin vs. Brown, 174 F2d 391, the Fifth Circuit Court of Appeals says that private individuals, members of the Political Clubs in South Carolina (all Primary laws of South Carolina having been repealed), and not officials of the State in any manner, can control state action in depriving Negroes of voting. The Court says (page 392):

> "The use of the Democratic primary in connection with the general election in South Carolina provides, as has been stated, a two step election machinery for that state, and the denial to the Negro of the right to participate in the primary denies him of all effective voice in the government of his country.
>
> "There can be no question that such denial amount to a denial of the constitutional rights of the Negro; **and we think it equally clear that those who participate in the denial are exercising state power to that end** since the primary is used in connection with the general election in the selection of state officers.
>
> "There can be no question, therefore, as to the jurisdiction of the Court to grant injunctive relief, whether the suit be viewed as one under the general provisions of 28 U.S.C.A. 41(1) to protect the rights guaranteed by the Constitution or under 28 U.S.C.A. 41(11) to protect the rights of citizens of the United States to vote or under 28 U.S.C.A. 41 (14) to redress the deprivation of civil rights."

In the case of Terry vs. Adams, also known as the Texas Jaybird Primary case, decided by the United States Supreme Court on May 4, 1953, the Court holds that private individuals, not officers and not in any way connected with State government, can nevertheless cause other individuals, or class of individuals, to be deprived of their

civil rights under a quasi-state action and can be sued for damages for their wrongful act (money damages sued for in sum of $5,000 waived).

We, therefore, submit and insist that under the rulings of the above cases that the District Court had jurisdiction and should have taken federal jurisdiction of Counts 1 and 4 and 5 of the Bill of Complaint.

As to dismissal those cases and reasons argued supra as to Counts 2 and 3 likewise apply as to Counts 1 and 4 and 5. Binderup vs. Pathe Exchange, Inc., 263 U.S. 291. Bell vs Hood, 327 U.S. 678.

Part 3 — Did Plaintiff Have Due Process of Law?
State Act Does Not Grant Due Process

It should be borne in mind at the outset that the act under which the defendants in this case purportedly acted does not grant due process. These are Sections 208, 209, and 210 of Title 45 of the 1940 Code of Alabama. They fail to grant due process in that no provision is made for the person whose sanity is questioned, to be present at a hearing, and no provision is made for notice to such person and, in fact, the statute specifically provides that hearing may be had without the presence of such person. The act makes it discretionary with the Probate Judge.

Such provisions of state laws have always been held to be unconstitutional.

In Walters vs. McKinnis, 221 Fed. 746, Mrs. Sara E. Walters, then in jail on an assault and battery charge, was charged under Pennsylvania statutes with being insane. Upon petition of the District Attorney of Allegheny County the Court appointed two physicians to examine her and make a report of their findings to the Court of Quarter Sessions of Pennsylvania. Upon their report, she was adjudicated to be insane and was committed to City Poor

Farm at Marshallsea as an indigent insane person. No notice of any kind was given to petitioner or to any friend or relative, of the proceeding to adjudicate her a lunatic, so that petitioner was adjudicated a lunatic and confined in the asylum without notice of any lunacy proceeding, without a hearing and without opportunity to defend. A writ of habeas corpus was denied by State Court, and she applied to the United States District Court for such a writ.

Mrs. Walters based her right to be discharged upon the 14th Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law. It was contended that her incarceration in the asylum without notice or an opportunity to defend was a plain violation of her constitutional rights.

The United States District Court pointed out that while she might have obtained the necessary relief through the State Court, nevertheless, that did not prevent action on the part of the Federal Court to grant relief, and granted the writ in so far as she was being held in the insane asylum. (Jurisdiction taken because constitutional right of due process involved.)

In the case of Shields vs. Shields, 26 Fed. Supp. 211 (1939), one Romie B. Shields was declared non compos by a Missouri Probate Court. He was not present because he was at the time of the hearing confined in the asylum. The United States District Court pointed out that a Missouri Statute which did not require that notice be given, had been held to be unconstitutional under the due process clause of both the Federal and Missouri Constitutions, citing Hunt vs. Searcy, 167 Mo. 158, 67 SW 206, 214, and then held:

"If jurisdiction does not exist when a person is not notified that he is entitled to be present at the inquiry

into his insanity, then with much greater reason is jurisdiction as well as due process lacking when he is notified but not permitted to do what the notice tells him he has a right to do." (Jurisdiction taken because of constitutional right of due process involved.)

In the case of Bolmer vs. U. S. F. and G. Co., 11 Fed. Supp. 560 (1935), the father of one Sterling P. Holbrook filed a petition in the Circuit Court of Ohio County, Kentucky, to have the son declared a lunatic. On that date the son was not in the State of Kentucky, but was in a mental institution. He was adjudicated a lunatic, no notice being given either to him or to the persons having him in custody. The United States District Court pointed out that the Court of Appeals of Kentucky had previously held in the case of Stewart vs. Taylor, 111 Ky. 247, and in other cases, that a judgment of luancy without notice to the accused was void. The Court then said:

"If the Court of Appeals for Kentucky had not construed the statutes of the State here involved, this Court would also hold that the proceedings in the Ohio Court were void and of no effect. Compare Chaloner vs. Sherman, 242 U.S. 452, 37 S. Ct. 136, 61 L. Ed. 427."

In the case of Chaloner vs. Sherman, 242 U.S. 452, this Court found that the plaintiff had notice and an opportunity to be heard at each stage of the proceedings and that for these reasons the elements of due process were met, although Chaloner did not appear.

In the case of Urquhart vs. Brown, 205 U.S. 179 (reversing Brown vs. Urquhart, 139 Fed. 846), Brown was charged with murder. He was acquitted by reason of insanity and was committed to an asylum by the trial court. He applied for a writ of habeas corpus to the Supreme Court of Washington on the ground that the statute under

which he was being held was in violation of the 14th Amendment of the Federal Constitution. The writ was denied. Brown then applied for a writ of habeas corpus to the Circuit Court of the United States for the Western District of Washington, and that court granted he writ, holding that while the commitment statute was constitutional, the trial court had not given him an opportunity to defend himself against charges lawfully preferred and to produce evidence in his defense, and that this was a deprivation of his liberty without due process of law.

The State of Washington appealed to the United States Supreme Court. This Court reversed the Circuit Court on the ground that proper procedure required that the case come up by writ of error to the Court of the State of Washington. This Court did not express any opinion either as to the constitutionality of the statute or as to the mode in which it was being administered by the State Court.

In In Re Petition of Michael Gannon, 5 L.R.A. 359 (Rhode Island Supreme Court, 1889), Michael Gannon was held in Butler Insane Hospital where he had been committed as an insane person. The commitment statutes of Rhode Island provided that a person may be committed by the certificates of two doctors of good standing. The certificates could be given entirely ex parte. There was no provision for any hearing or any legal proceeding at all. The Court held that these statutes denied due process to an insane person and that the statutes were unconstitutional.

In the case of Underwood vs. The People, 32 Mich. 1, Underwood was acquitted of murder on account of insanity and was confined in an insane hospital. He applied for a writ of habeas corpus, alleging that he was illegally confined without due process of law. The Michigan Su-

preme Court in ordering Underwood discharged from custody, held (page 4):

> In this country, where all legislation must be within constitutional limits and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of liberty without due process of law. Any involuntary control or seclusion is imprisonment and that is only justifiable when enforced under valid laws. Every person has a right at all times to resort to the courts to have the legality of restraint determined unless he is imprisoned under valid judgment proceedings where he had a regular trial or hearing."

In the case of City of Portland vs. City of Bangor, 65 Maine 121, the Court held:

> "The statute of this state which declares that two or more overseers of the poor of any town or city, may by a writing under their hands, commit to the work house 'all persons able of body to work and not having estate or means otherwise to maintain themselves who refuse or neglect so to do, and all such as live a dissolute, vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood; and all such as spend their time and property in public houses to the neglect of their proper business', * * * * clearly violates the Fourteenth Amendment to the Federal Constitution. That article declares that no state shall deprive any person of life, liberty or property without due process of law; and while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove than an ex parte determination of two overseers of the poor is not such due process."

In the recent Alabama Case of Moses vs. Tarwater, 58 So. (2d) 757 (April, 1952), the question of due process and the constitutionality of Title 45, Secs. 208, 209 and 210 was raised. Dr. Moses had been adjudicated insane and confined in the Bryce Insane Hospital. Subsequently he filed a writ of habeas corpus under said sections alleging that he was then sane and should be released.

Upon a hearing of the writ a jury found that he was still insane, and the Circuit Judge ordered Dr. Moses to be re-incarcerated in the Bryce Hospital. On appeal from the denial of the writ of habeas corpus the Supreme Court of Alabama by-passed the question of constitutionality of the statutes, and held that constitutionality of a law will not be considered on appeal unless essential to decision of the case then before the Court. The Court said (page 757):

> "The evidence was overwhelming that Dr. Moses was insane and should not be discharged, and the jury so found and the Court so adjudged and determined. This is a sad case but the Court is convinced that the jury verdict is right and should be sustained both for the safety and well being of the public and of Dr. Moses."

Mr. Justice Brown filed a very strong and well reasoned dissenting opinion in the case, holding that the statutes were unconstitutional; that they did not afford due process of law; that Dr. Moses was being held illegally from the first commitment in Mobile County; and that his jury trial did not give him the opportunity to offer competent medical testimony in his own behalf.

In Simon vs. Craft, 182 U.S. 427, also a case involving Alabama Commitment statutes, the United States Supreme Court took jurisdiction upon writ of error to the Supreme Court of Alabama upon petition of an insane person who

alleged that she had been denied due process. The United States Supreme Court took jurisdiction on the averment of lack of due process, but decided that she did receive due process, as she had notice of the proceeding and an opportunity to be present and to be heard.

For other cases to be compared with the cases above set forth, see:

Bailey on Habeas Corpus, Vol. 1, page 436;

In Re Nagle, 135 U.S. 41;

Dexter vs. Hall, 82 U.S. 9.

Petitioner submits that under the above cases plaintiff was plainly and clearly denied due process of law under the 14th Amendment to the United States Constitution.

Part 4 — Complaint Not Subject to Dismissal on Motion

Plaintiff submits that a motion to dismiss the complaint should not be granted unless the complaint does not contain sufficient allegations or unless it clearly appears that the complaint cannot be maintained. Each count of the complaint pleads every averment required by the statute under which it is brought. So far as the allegations of each count are concerned, they are sufficient to state a good cause of action on their face, and therefore the order of dismissal should not have been granted, regardless of the facts.

Without question the counts of the complaint charge everything set forth in the applicable statute. Without doubt respondents are accused of acting under color of law and of unlawfully using state statutes to deprive Complainant of rights guaranteed to her under the United States Constitution. The complaint states a cause of action under the Constitution and laws of the United States of which the Federal Courts have jurisdiction.

In the case of Binderup vs. Pathe Exchange, Inc., et al (1923) 263 U.S. 291, the United States Supreme Court said (page 305) that jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact.

A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a federal court, and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged, any more than upon the way it may decide as to the legal sufficiency of the facts proven.

Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or, in other words, is plainly without color of merit.

In Bell vs. Hood, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773, the plaintiffs sued F.B.I. Agents in the District Court for depriving the Plaintiffs of their liberty without due process of law, and for unreasonable searches and seizures in violation of the Fourth and Fifth Amendments to the United States Constitution. The District Court dismissed the suit for lack of federal jurisdiction, and denied to Plaintiffs the right to amend. The Court of Appeals affirmed the District Court, 150 F. 2d. 96. The United States Supreme Court reversed the Court of Appeals. Mr. Justice Black wrote the opinion, and among other things, said:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled

that the failure to state a proper cause of actions calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

"Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the . . . (Constitution or laws) of the United States by his declaration or bill.' The Fair vs. Kohler Die & Specialty Co., 228 U.S. 22, 25, 57 L. Ed. 716, 717, 33 S. Ct. 410.

"The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution. And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions

to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

"Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."

The case of Bell vs. Hood is very similar to the case at bar. The question involved in that case was whether or not F.B.I. Agents could be sued for damages for violation of the Fourth and Fifth Amendments of the Constitution. It was ultimately determined that these F.B.I. Agents could not be sued. This determination, however, was one upon the merits, and not one upon a jurisdictional question. The United States Supreme Court reversed the District Court and the Court of Appeals for determining this question as a matter of jurisdiction, rather than upon the merits. There is no question in the case at bar, but that the claim of the Appellant arises under the Constitution and laws of the United States, and this alone gives the Court jurisdiction over the subject matter, regardless of whether or not the complaint states a claim.

The complaint in the case at bar so clearly states a substantial and material claim arising under the Federal laws and Constitution, that no question can arise as to the jurisdiction of the District Court over the subject matter.

In line with these two pertinent decisions, we respectfully insist that the District Court should not have dismissed plaintiff's bill of complaint as to counts 2 and 3 of the complaint.

Summary and Conclusion

Ever since the Civil Rights Statutes were passed back in the old Ku Klux days following the Civil War, two of which statutes are now known as 8 U.S.C. 43 and 8 U.S.C. 47(3), there have been but few times when anyone has tried to use them in seeking money damages. We find no case regarding 8 U.S.C. 43 that has gone to this Court, although there are a few cases in District Courts and Courts of Appeal of the various circuits, a number of which are in conflict in the several jurisdictions.

From the cases cited and the arguments advanced, supra, we can come to no other conclusion than that private individuals are amenable under the provisions of the statute if they themselves do, or cause to be done, any of the acts prohibited "under color of law." In our complaint under counts 2 and 3, defendants are charged with wrongful acts against plaintiff. Plaintiff charges that the defendants, under color of a specified law caused her to lose her liberty without due process.

The cases cited, supra, clearly set out that if private individuals acting under some state law, either with or without conjunctive action of state officers, either do or cause to be done those prohibited wrongs to any citizen of the United States, they are answerable and amenable under the statute provisions. The wrong must be done under color of state law, but nowhere does the statute provide that it must be done by officers. If individuals cause the state action to be done, regardless of by what means, and the state action deprives any citizen of the United States of

any guaranteed Constitutional right, then such individuals are amenable under 8 U.S.C. 43.

In the case before the Court there is a further reason why defendants in this particular case, under the particular facts of this case are amenable under 8 U.S.C. 43. The Alabama Insane Commitment Statute, Title 45, Sec. 208, 209 and 210 of the Alabama Code designates a relative, friend or other party interested who desires to place a person as a patient in one of the state hospitals as the person who shall apply to the Probate Judge of the county in which the person resides, and the Probate Judge without delay, shall investigate the case by examining witnesses or not as he sees fit, and if he is reasonably convinced that the case is a suitable one he shall apply to the Insane Hospital at Tuscaloosa for admission. When informed by the superintendent that the person can be received as a patient, the judge shall examine witnesses, at least one of whom shall be a physician, and fully investigate the facts, either with or without a jury, and either with or without the presence in court of the person the grade of whose mental disqualification is under investigation.

No provision is made that the alleged insane person be notified, or that the insane person be represented by a guardian ad litem as in all other cases dealing with insane persons, and no opportunity to be heard is given to the alleged insane person. Under this statute certainly defendants Marylan Pritchett who applied to the Probate Judge, and Dr. John David Johnston, the doctor who was supposed to examine plaintiff and who did not so do, are at least quasi-officers of the state as being the persons designated to put a state law into operation; and the other defendants we charge aided and abetted them in such action in starting a state law in operation by which plaintiff was wrongfully injured.

The adjudication of plaintiff, the order of her incarceration in Bryce Insane Hospital, the order of her arrest and consequent imprisonment were certainly state action, done under color of state law, and the operation of the state law was done or caused to be done by defendants, some actively, some inactively joining them, and two at least being the very persons, or of the class of persons, designated by the laws to set the law into operation. They are private individuals who have caused state action to occur.

The case of Terry vs. Adams, ...U.S....., known as the Texas Jaybird Primary case, decided by this Court on May 4, 1953, removed the doubt and uncertainty with which the various Federal Districts and Courts of Appeal have treated and considered cases arising under the Civil Rights statutes long known as the Ku Klux Klan legislation, of which 8 U.S.C. 43 and 8 U.S.C. 47 (3) are part.

No case has been before this court that we can find under 8 U.S.C. 43. We find one case that has been before this court under 8 U.S.C. 47 (3) and that is Collins vs. Hardyman, 341 U.S. 658. In that case this court refrained from considering any constitutional question. This court there simply held that conspiracies under 8 U.S.C. 47 (3) had to be such as would altar, impair or deny equality of rights under the law and the court held that the facts and pleadings in Collins vs. Hardyman did not bring it within the narrow class of conspiracies contemplated and designated by Congress in the statutes.

Many times Federal Courts have held that private individuals could not control or prevent state action; that only officers or quasi-officers could control or prevent state action. But Terry vs. Adams, to the contrary, now holds that private individuals who are not in any manner state officers, and who are not in any manner connected with

the State Democratic party, nevertheless can and have caused such state action as to deprive certain persons in Texas of exercising their right of franchise. We believe this case fully establishes the principle that individuals, not officers, can control or prevent state action and thereby come under the provisions of the Civil Rights Act.

In the Terry vs. Adams case, Mr. Justice Clark in an opinion in which the Chief Justice, Mr. Justice Reed, and Mr. Justice Jackson, concur, agrees with the Court's opinion delivered by Mr. Justice Black in a separately written concurring opinion. On page 4 of Mr. Justice Clark's opinion, he says:

> "The Court of Appeals, in reversing the District Court largely relied on what it deemed 'the settled course of decision culminating in Collins vs. Hardyman 341 U.S. 651, that it was not against individual, but against state action that the Fourteenth and Fifteenth amendments and 8 U.S.C.A. Secs. 43 and 47, were, and are, directed. But Collins dealt not with racial discrimination at the ballot box, but merely 'a lawless political brawl, precipitated by a handful of white citizens against other white citizens 341 U.S. at 662. In any event, Collins adjudicated that Congress in the narrow class of conspiracies defined by the Civil Rights statutes had not included the conspiracy charged in that particular complaint expressly refraining from constitutional questions: ibid, that case cannot be held controlling here."

This Jaybird Primary case as we interpret it overrides the principles in Collins vs. Hardyman. However, the case before the court differs from Collins vs. Hardyman in so many particulars, that we submit that Collins vs. Hardyman should not have been the measuring stick by which the Fifth Circuit Court of Appeals and the Federal District Court decided this case before the Court. Collins vs.

Hardyman did not allege any state law was used by anyone at all to deprive plaintiffs of their civil rights. Their complaint did not allege or show that any of the defendants used or caused to be used or procured any state officer to use any state law to deprive them of any of their constitutional rights and did not show they were in any special class of persons either by allegations of their complaint or by the overt acts recited.

On the other hand in this case, plaintiff alleges that defendants conspired to, and did have her by state action through the Probate Court of Pike County, Alabama, adjudicated insane, ordered committed to the Bryce Insane Hospital, arrested and confined in jail in the Pike County jail, all without due process of law. She avers that she was caused her wrongful treatment by reason of state action and that defendants caused or motivated such action. The overt acts, a necessary second part to conspiracy charges, set out by what overt acts the defendants caused such state action. The Alabama Insane Commitment Statutes, under decisions in reference to similar state statutes, are not constitutional and do not provide "due process of law" to a certain narrow class of persons, viz, insane persons and those persons who are averred to be insane of whatever race or creed. The wording of the statute is clear. It sets up a narrow, small class of individuals affected by the state law.

No other person or class of persons other than insane persons or persons averred to be insane, are covered by, or designated by or affected by said statutes. Plaintiff was in that class, as was every other person in Alabama, regardless of race or creed, who is so unfortunate as to be insane or averred to be insane. We cannot think that Collins vs. Hardyman adjudicates the case now before this court. The facts and pleadings are far different in the two cases.

Closely allied to Terry vs. Adams, supra, and in fact cited by that case are the two South Carolina cases decided by the Fifth Circuit Court of Appeals, viz., Rice vs. Elmore, 165 Fed. (2) 387 and Baskin vs. Brown, 174 Fed (2) 391. These two cases first laid down the principle established in the Terry vs. Adams case, holding in effect that individuals who have no connection with the state and who are not officers of South Carolina still can cause state action by South Carolina whereby negroes are deprived of their constitutional rights under the Federal Constitution and amendments thereto as to voting. The Court holds:

> "The denial to the negro of the right to participate in the primary denies him of all effective voice in the government of his country;
>
> "There can be no question that such denial amounts to a denial of the constitutional rights of the negro; and we think it equally clear that those who participated in the denial are exercising state power to that end since the primary is used in connection with the general election in the selection of state officers."

The above two South Carolina cases, with the Texas Jaybird Primary case, as we interpret them, adjudicate that individuals who are not state officers can cause state action. We submit that our instant case comes under this same rule.

For the reasons set forth in detail above we submit that the action of the United States Court of Appeals for the Fifth Circuit should be reviewed by this Court and that the petition for writ of certiorari should be granted.

Respectfully submitted,

WALTER J. KNABE
511 Hill Building
Montgomery, Alabama
ATTORNEY FOR PETITIONER

Of Counsel:
W. R. Martin
Ozark, Alabama

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1953

NO. 236

FANNIE MAE WHITTINGTON,
Petitioner,

Vs.

DR. JOHN D. JOHNSTON,
et al

On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinion Below

The opinion of the Circuit Court of Appeals (R. 43-55) is reported in 201 F. 2d 810.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered January 29, 1953 (R. 55). A petition for rehearing was denied April 13, 1953 (R. 62). The petition for writ of certiorari was filed August 4, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATEMENT OF THE CASE

Petitioner's original complaint consisted of one count, based on 8 U. S. C. 47 (3). (R. 2) The facts alleged charged that the Respondents conspired to wilfully, knowingly, wantonly and unlawfully deprive Petitioner of her civil rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States by causing the Petitioner, without due process of law, to be declared insane and ordered committed to Bryce Insane Hospital and to be arrested and confined in the county jail of Pike County, Alabama for five days awaiting internment in said hospital. Also that she subsequently was declared sane by a hearing provided for by Title 45, Section 210, Code of Alabama 1940 (R. 3 and 4).

The District Court's action on Respondents' motion to dismiss on the grounds that the court had no jurisdiction and that the complaint failed to state a cause of action under 8 U. S. C. 43 or 8 U. S. C. 47 (3) (R. 15-17) is not reflected in the record, but Petitioner amended her complaint adding four counts thereto (R. 18-31).

Counts 4 and 5 of the amended complaint are similar to the original complaint but allege that Petitioner was sane at the time of the occurrence complained of.

Counts 2 and 3 allege that Respondents under color of Title 15, Section 432 and Title 45, Sections 208, 209 and 210, Code of Alabama 1940 subjected or caused the Petitioner to be subjected to a deprivation of rights, privileges and immunities guaranteed by the Fourteenth Amendment of the Constitution by causing her to be declared insane and causing the other acts complained of in Count 1, all without notice or an opportunity of being heard (R. 18-22).

Respondents' motion to dismiss the amended complaint for lack of jurisdiction in a federal court and because the facts alleged failed to state a cause of action under either 8 U. S. C. 47 (3) or 8 U. S. C. 43 (R. 31-34) was granted, the District Judge stating that the Court did not have jurisdiction. (R. 35-38)

The United States Circuit Court of Appeals for the Fifth Circuit affirmed the case (R. 43-46).

SUMMARY OF ARGUMENT

I.

To be entitled to redress under 8 U. S. C. 47 (3), Petitioner must suffer a deprivation of her rights to equal protection of the laws or of equal privileges and immunities under the laws. A denial of equal protection of the laws and equal privileges and immunities under the laws contemplates some manipulation of the law or its agencies against the rights of such person, or discrimination against the rights of such person because of race, color or class. To single out anyone for illegal aggression does not deny him equal protection of the laws.

8 *U. S. C.* 47 (3)
Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835
Collins vs. Hardyman 341 U. S. 651, 95 L. ed. 1253
Moffett vs. Commerce Trust Co. 187 F. 2d 242, Cert. denied 242 U. S. 818
Mitchell vs. Greenough, 100 F. 2d 184, Cert. denied 306 U. S. 659
Tinsley vs. Anderson 171 U. S. 101, 43 L. ed. 91

II.

A conspiracy to deny due process of law is not a conspiracy to deny equal protection of the laws or equal privileges and immunities under the laws. 8 U. S. C. 47 (3) does not authorize an action for the denial of due process of law.

8 *U. S. C.* 47 (3)
Mitchell vs. Greenough 100 F. 2d 184, Cert. denied 306 U. S. 659
Tinsley vs. Anderson 171 U. S. 101, 43 L. ed. 91

III.

8 U. S. C. 43 provides a cause of action against persons who act under color of law but does not apply to the acts of private

individuals in their personal pursuits. It is directed at the acts of those clothed with official or state authority. The Fourteenth Amendment of the Constitution of the United States is directed at the several states and not at individuals.

8 U. S. C. 43
United States vs. Classic 313 U. S. 299, 85 L. ed. 1368
Screws vs. United States 325 U. S. 91, 89 L. ed. 1495
Watkins vs. Oaklawn Jockey Club 183 F. 2d 440
United States vs. Cruikshank 92 U. S. 542, 23 L. ed. 588
Hodges vs. United States 203 U. S. 1, 51 L. ed. 65
United States vs. Wheeler 254 U. S. 281, 65 L. ed. 270
Snowden vs. Hughes 321 U. S. 1, 88 L. ed. 497
Bottone vs. Lindsley 170 F. 2d 705, Cert. denied 336 U. S. 944
Williams vs. United States 341 U. S. 97, 95 L. ed. 774
Terry vs. Adams .....U. S..... 97 L. ed. 745 (advance sheet)

IV.

In this case, it is unnecessary to determine the constitutionality of the Alabama commitment statutes relating to insane persons, since the complaint fails to allege a statement of facts sufficient to invoke Federal jurisdiction. The Alabama commitment statutes for insane persons, when read together fully protect an insane person's constitutional rights by providing a writ of habeas corpus to protect such rights.

Title 15 *Section* 3, *Code of Alabama* 1940
Mooney vs. Holohan 294 U. S. 103, 79 L. ed. 791

V.

Where the alleged claim under the Constitution of the United States or federal statutes is made solely for the purpose of creating federal jurisdiction over what would otherwise be an action to vindicate a right arising only under state law and no substantial facts establishing federal jurisdiction are alleged, mere conclusions asserting the violation of a constitutional right are insufficient to invoke federal jurisdiction.

Bell vs. Hood, 327 U. S. 678, 90 L. ed. 939
Lyons vs. Weltmer, 4 Cir., 174 F. 2d 473
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Hanford vs. Davies 163 U. S. 273, 41 L. ed. 157
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Shulthis vs. MacDougal 225 U. S. 561, 56 L. ed. 1205
Starin vs. New York 115 U. S. 248, 29 L. ed. 388
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James Yglesias vs. Gulfstream Park Racing Association, Inc., 201 F. 2d 819, Cert. denied June 15, 1952.
Whittington vs. Johnston, et al, 201 F. 2d 810.

ARGUMENT

I.

Counts 1, 4 and 5 of Petitioner's original complaint attempt to allege a conspiracy to deprive Petitioner of rights which are guaranteed under the Fourteenth Amendment of the Constitution of the United States, a remedy for which is given by 8 U. S. C. 47 (3). The facts allege, that based upon false affidavits of respondents, the Probate Court of Pike County, Alabama declared Petitioner insane, when in fact she was sane and imprisoned her in the county jail for five days.

The Statute upon which these counts of the complaint are based is 8 U. S. C. 47 (3) which is as follows:

> "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Ter-

ritory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for the President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R. S. 1980."

To come within the purview of this statute the counts of the complaint must allege such facts as will indicate that petitioner was deprived of equal protection of the law or equal privileges and immunities under the laws. There are no facts alleged in these counts of the complaint which would indicate that Petitioner was denied any right or privilege afforded others because she was of any particular race, color or class. Equal protection of the laws and equal privileges and immunities under the laws means that, when action is taken under the law, the persons affected shall receive no preference or detriment because of his or her race, color or class. The complaint before this Court contains no allegation that would indicate that Respondents have done any act to influence or obstruct the law in its usual course. At most the overt act charged against the several Respondents is that they issued false affidavits to implement proceedings against Petitioner, which proceedings were regularly carried out by the Judge of Probate and other officers of the court resulting in the declaration of insanity of the Petitioner and imprisonment of the Petitioner.

This Court in *Collins vs. Hardyman,* 341 U. S. 651, 95 L. Ed. 1253, stated the distinction as follows:

> "What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by the law, or their equality of privileges and immunities under the law. There is not the slightest allegation that the defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it. The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with those sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights under the laws and to protection of the laws remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob."

In the case of *Moffett vs. Commerce Trust Company,* 187 F. 2d 242, Cert. denied 242 U. S. 818, the court stated:

> "The first clause of the third subdivision of Section 47 does declare that, if two or more persons conspire to deprive 'any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,' the injured party may recover damages. The plaintiff's argument appears to be that this language creates a claim against any two persons who conspire to injure another for spite or other improper motives, ap-

parently because to single out anyone for illegal aggression is to deny him equal protection of the laws. Quite aside from the fact that in order so to construe the words they must be broken from a context which shows their more limited meaning, it is apparent that they could not have such a scope without destroying their validity constitutionally."

See *Mitchell vs. Greenough*, 100 F. 2d 184, Cert. denied 306 U. S. 569. *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, *Tinsley vs. Anderson*, 171 U. S. 101, 43 L. ed. 91, to the same effect.

There is a complete absence of authority for Petitioner's argument that an insane person or one who may be adjudged insane creates a separate and distinct class of persons. Respondent submits that it is wholly without merit.

II.

There is a vast difference between the cause of action created by 8 U. S. C. 47 (3) and 8 U. S. C. 43. The former creates a cause of action where there is a deprivation of equal protection of the laws or equal privileges and immunities under the laws but it does not grant a cause of action for the denial of due process of law. The Court stated in *Mitchell vs. Greenough*, 100 F. 2d 184, Cert. denied 306 U. S. 657 as follows:

> "It is clear that conspiracy to deny due process of the law is not conspiracy to deny a person 'equal protection of the law', within the meaning of that phrase as used in the Fourteenth Amendment, U. S. C. A. Const. Amend. 14 and the act under consideration (8 U. S. C. A. Sec. 47, supra). The two propositions are quite distinct. Tinsley vs. Anderson, 171 U. S. 101, 106, 18 S. Ct. 805, 43 L. ed. 91. The prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action."

This distinction was also shown in *Tinsley vs. Anderson* 171 U. S. 101, 43 L. ed. 91.

Counts 1, 4 and 5 of Petitioner's complaint are based on 8 U. S. C. 47 (3) and allege that the acts complained of were done without due process of law.

III.

The remaining counts of the complaint, counts 2 and 3, attempt to allege a cause of action under 8 U. S. C. 43, which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. 1797."

The facts alleged in these counts are to the effect that Respondents, who are private individuals and not officers of the law or persons acting as officers of the law, caused the Petitioner to suffer a deprivation of rights secured to her by the Fourteenth Amendment of the Constitution of the United States, in that, under color of certain statutes of Alabama they caused the Petitioner, a sane woman, to be declared insane, arrested and confined without notice.

The phrase contained in the federal statute in question, "every person who under color of any statute, etc.", has been interpreted and on many occasions applied by this Court, where the protection of the Fourteenth Amendment is sought, in such a manner as to restrict the definition of persons to officers and officials of the state and local governments and exclude the acts of private individuals. This Court clearly defined the meaning of color of law in the case of *United States vs. Classic*, 313 U. S. 299, 85 L. ed. 1368 when it stated as follows:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law is action taken under color of state law."

and in the case of *Screws vs. United States*, 325 U. S. 91, 89 L. ed. 1495, which stated as follows:

> "It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

In the *Screws* case where the Court was commenting on a criminal statute, it stated as follows:

> "It is true that that statute did not contain the words under 'color' of law. But the Court in deciding what was state action within the meaning of the Fourteenth Amendment held that it was immaterial that the state officer exceeded the limits of his authority. ' . . . as he acts in the name and for the State, and he is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.' 100 U. S. at Page 347."

These counts of the complaint do not allege that the Respondents themselves detained, arrested or committed the petitioner to the insane asylum under pretense that they were acting under state statutes or under pretense that they were officers or officials clothed with state authority. They only allege that Respondents *caused* the arrest and order of commitment to be issued. For the alleged facts to be sufficient to bring this cause within this statute, the Petitioner must necessarily allege that the arresting officers or committing judge pretending they or he had authority under the law, manipulated or obstructed the law in such a way as to violate petitioner's rights protected by the Fourteenth Amendment of the Constitution and that the Respondents aided or abetted these officials in such a manner that would cause their acts to be action by the state. The acts charged against them are no more than would be charged against a defendant in a suit for false arrest or false imprisonment against a private individual who has a warrant issued for the arrest of another private in-

dividual upon a false affidavit. The allegations that these acts were done wilfully, knowingly, wantonly, maliciously and unlawfully add no strength to the complaint sufficient to bring it under 8 U. S. C. 43.

In the case of *Watkins vs. Oaklawn Jockey Club,* 183 F. 2d 440, where the defendants were officers of the law but privately employed by the Jockey Club and, therefore, acting within the ambit of their personal pursuits, they ejected the plaintiff from the race track and a damage suit was instituted under 8 U. S. C. 43. The Court concluded that it was necessary for the plaintiff to prove that the defendants in ejecting him from the race track were acting under color of state law and not merely as individuals or agents of the Jockey Club.

Petitioner charges that the rights, of which she has allegedly been deprived, are guaranteed to her by the Fourteenth Amendment of the Constitution of the United States. It is elementary that the Fourteenth Amendment is directed at the states and not at individuals. *United States vs. Cruikshank,* 92 U. S. 542, 23 L. ed. 588; *Hodges vs. United States,* 203 U. S. 1, 51 L. ed. 65; *United States vs. Wheeler,* 254 U. S. 281, 65 L. ed. 270; *Snowden vs. Hughes,* 321 U. S. 1, 88 L. ed. 497; *Watkins vs. Oaklawn Jockey Club,* 183 F. 2d 440, supra.

In the case of *Bottone vs. Lindsley,* 170 F. 2d 705, Cert. denied 336 U. S. 944, the Court stated as follows:

> "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision. "The Fourteenth Amendment did not alter the basic rela-

tions between the States and the national Government." Screws v. United States, supra, 325 U. S. at page 109, 65 S. Ct. at page 1039, 79 L. ed. 1495, 162 A. L. R. 1330. Nor does it "assure uniformity of decisions or immunity from merely erroneous action * * *." See Justice Frankfurter concurring in Snowden v. Hughes, 321 U. S. 1, 15, 64 S. Ct. 397, 404, 88 L. ed. 497. See also Moyer v. Peabody, supra."

Petitioner argues that the United States Circuit Court of Appeals for the Fifth District and that this Court have held that individuals acting in their individual capacity and not as officers of the law are subject to a suit for damages in a Federal Court under 8 U. S. C. 43. They rely upon *Williams vs. United States*, 341 U. S. 97, 95 L. ed. 774, and *Terry vs. Adams* .....U. S..... 97 L. ed. 745 advance sheet. These cases in each instance hold that the actions of the individuals, were such as would make them equivalent to state action and, if not, they would not have come under the protection of the Federal Statutes involved. The Court stated in the *Williams* case as follows:

> "Moreover, this was an investigation conducted under the aegis of the state, as evidenced by the fact that a regular police officer was detailed to attend it. We need go no further to conclude that the lower court to whom we give deference on local law matters, see Gardner v. New Jersey 329 U. S. 565, 583, 91 L ed 504, 520, 67 S. Ct. 467, was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person."

and, in *Terry vs. Adams*, the Court stated as follows:

> "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purpose of the Fifteenth Amendment. The

use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election."

For counts 2 and 3 of the complaint to come within the purview of 8 U. S. C. 43 they must necessarily allege the deprivation of such rights and immunities as are secured by the Constitution and laws of the United States. All rights and privileges enjoyed by citizens of the United States are not guaranteed by the Constitution of the United States. Many of these rights are guaranteed by the states and the protection of them is within the exclusive province of the states. This principle is recognized in *United States vs. Cruikshank*, 92 U. S. 542, 23 L. ed. 588 which states:

> "They charge the intent to have been to deprive the citizens named, they being in Louisiana, of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator."
>
> Sovereignty, for this purpose, rests along with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state, than it would be to punish for false imprisonment or murder itself.

> The Fourteenth Amendment prohibits a state from depriving any person of life, liberty or property without due process of law; but this adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society * * *"

These counts of the complaint allege the invasion of private rights by private parties over which a Federal Court has no jurisdiction. *Hodges vs. United States,* 203 U. S. 1, 51 L. ed. 65; *United States vs. Wheeler,* 254 U. S. 281, 65 L. ed. 270; *Snowden vs. Hughes,* 321 U. S. 1, 88 L. ed. 497; *Watkins vs. Oaklawn Jockey Club,* 183 F. 2d 440, supra.

IV.

It is unnecessary to decide whether or not the Alabama Commitment Statutes relating to insane persons afford due process of law. A determination of this question will not bring the allegations of these counts within the scope of 8 U. S. C. 43.

There is no allegation that the petitioner has exhausted all state remedies nor is there any showing that the state court has declared the statutes unconstitutional.

The commitment statutes of the State of Alabama should be read together and, when read together, it is obvious that they protect an insane person's constitutional rights. Title 15, Section 3, Code of Alabama 1940 reads as follows:

> "Any person confined as insane may prosecute a writ of habeas corpus as provided in this chapter; and if the judge, or the jury, when the petitioner demands the issues arising to be tried by a jury, shall decide at the hearing that the person is insane, such decision does not bar a second application alleging that such person has been restored to sanity."

This Court is the case of *Mooney vs. Holohan,* 294 U. S. 103, 79 L. ed. 791, stated as follows:

"We are not satisfied, however, that the State of California has failed to provide such corrective judicial process. The prerogative writ of habeas corpus is available in that state, Constitution of California Art. 1, Sec. 5; Article 6, Sec. 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without the process of law in violation of the Constitution of the United States * * * * In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the state has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

V.

Respondents have heretofore shown in this brief that the facts alleged in each count are insufficient to confer jurisdiction on a Federal Court under the two statutes which are the basis for jurisdiction in this cause. Jurisdiction can only be conferred in this case by the statutes under which the case is brought, there being no diversity of citizenship. All references to violations of any rights guaranteed by the Constitution of the United States or Federal Statutes are mere conclusions and not substantiated by the facts alleged. *Bell vs. Hood*, 327 U. S. 678, 90 L. ed. 939; *Lyons vs. Weltmer*, 4 Cir., 174 F. 2d 473; *Bottone vs. Lindsley*, 170 F. 2d 705, Cert. denied 336 U. S. 944.

The federal question must really appear, not by mere inference or suggestion. *Hanford vs. Davies*, 163 U. S. 273, 41 L. ed. 157.

The federal question must be an essential or integral part of the case. *Tennessee vs. Union & Planters Bank*, 152 U. S. 454, 38 L. ed. 511, *Shulthis vs. MacDougal*, 225 U. S. 561, 56 L. ed. 1205.

Mere references to the federal constitution or laws and mere assertions that a federal question is involved are not sufficient to confer jurisdiction. *Starin vs. New York*, 115 U. S. 248, 29 L. ed. 388; *Farrell vs. O'Brien*, 199 U. S. 89, 50 L. ed. 101; *McCartney vs. State of West Virginia*, 156 F. 2d 739.

Respondents desire to bring to the attention of this Court the similarity of the questions involved in the cases of *Marianne Yglesias vs. Gulfstream Park Racing Association, Inc.*, 201 F. 2d, 817 Cert. denied June 15, 1952 and *Joseph Yglesias vs. Gulfstream Park Racing Association, Inc.*, 201 F. 2d 819 Cert. denied June 15, 1952, these cases being No. 752 and No. 753 of the October term, 1952. The Court decided in these cases that there was no merit in the applications for certiorari and denied both applications on June 15, 1952.

The action of this Court in these two cases appears to be conclusive of the questions raised in the case of this Petitioner now before this Court. A similarity of the questions involved is also shown by the fact that Justice Rives of the Fifth Circuit Court of Appeals in dissenting in the *Yglesias* cases applied thereto, his dissenting opinion which was written in the case affecting these Respondents (*Whittington vs. Johnston*, 201 F. 2d 810). The *Yglesias* cases arose out of a suit brought for the recovery of damages under 8 U. S. C. 43 where a corporation was charged with false imprisonment. The Circuit Court of Appeals held that the facts alleged failed to bring the complaint within the purview of the federal statute necessary to give jurisdiction to a federal court.

CONCLUSION

Since Petitioner's complaint contains no allegations of fact to substantiate a conspiracy to deprive her of equal protection of the laws or of equal privileges and immunities under the laws; and no allegations that Respondents acted as officers of the law or in pretense of officers of the law; and, since the

rights alleged to have been invaded are rights, the protection of which is in the exclusive province of the State, Respondents respectfully submit that the dismissal of the complaint was proper and that the petition for writ of certiorari should be denied.

Respectfully submitted,

Ewell C. Orme,
Troy, Alabama.

Jesse M. Williams, Jr.,
Montgomery, Alabama,
Attorneys for Respondents.